STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED August 25, 2000
v	No. 220903 Wayne Circuit Court
ELON LOUIS WILLIAMS, Defendant-Appellee.	LC No. 99-003348

Before: Owens, P.J., and Neff and Fitzgerald, JJ.

PER CURIAM.

The prosecutor appeals of right from the trial court's order which purported to acquit defendant, after a bench trial, of the charge of carrying a dangerous weapon in a motor vehicle, MCL 750.227; MSA 28.424. We reverse.

The Relevant Facts

Defendant was a passenger in a car that was stopped by plainclothes police officers who were in an unmarked police car that was equipped with flashing lights mounted on the dashboard and rear parcel shelf of the vehicle. The police claimed that the driver of the vehicle was stopped because he failed to signal before making a left turn.

According to the police, when one of the officers approached the passenger side of the vehicle, he observed the glove compartment open and close and saw a handgun being placed inside the glove compartment. Closer inspection revealed a Smith & Wesson 9 mm semi-automatic handgun in the glove compartment, and two ammunition clips, one for a 9 mm weapon and one for a .40 caliber weapon, on the floor of the passenger's side of the vehicle. When defendant was removed from the car and patted down, it was determined that he was wearing a bulletproof vest. The driver was also wearing a bulletproof vest.

Although opining that the traffic stop may have been illegal, the trial court denied defendant's motion for a directed verdict of acquittal.

Defendant and the driver then testified that the driver did not fail to signal his turn, that they were both unaware of the presence of the handgun in the vehicle (which they had borrowed), and that they believed that the weapon was discovered by the police in a center console after defendant and the driver were removed from the vehicle and the police conducted a nonconsensual search.

At the conclusion of the proofs, the trial court stated:

> People have proven the facts beyond a reasonable doubt. That's not the problem that I'm having. The Defendant is adjudicated not guilty. I don't have to give a reason for that, but I will.
>
> There are two statutes in this State, one of which, one of which in pertinent part reads: A driver of a motor vehicle who is given by hand, voice, emergency light, or siren, a visual or audible signal by the police or conservation officer acting in a lawful performance of his or her duty, directing the driver to bring his or her motor vehicle to a stop, should not willfully fail to obey that direction by increasing the speed of the vehicle, extinguishing the lights of the vehicle, or otherwise attempting to flee or elude the police or conservation officer.
>
> This subsection does not apply unless the police or conservation officer giving the signal is in uniform and the vehicle given by the police or conservation officer is identified as an official police or Department of Natural Resources vehicle.
>
> The undisputed testimony of the prosecution witnesses was that they were in plainclothes in what they described as a semimarked vehicle, the semi alluding to lights in the rear deck and in the windshield. Police lights.
>
> The statute formerly addressed stops made at night, both of them to which I allude. The history, I believe, of that is because there was a person in California named Carol Chessman who masqueraded as a police officer, putting, I believe it was a red balloon over a spotlight, and used that device to stop women, if I remember correctly, and rape and kill them. There have been instances of persons, civilians, masquerading as police officers in this city not long ago, pulling people over similarly, for the protection of the public, and care and caution on the part of the police.

The prosecutor then inquired if the court had found that the prosecution had proven its case beyond a reasonable doubt and the trial court responded: "Proven he was carrying a pistol to [sic – in a] motor vehicle without a license." The court further stated that it had earlier indicated it believed that there was an illegal stop, and observed that it had a responsibility

> to see that the constitutional and statutory rights of both the People and of the accused are implemented. Whether somebody brings a motion for evidentiary hearing [or] doesn't, whether they are aware of the law or not, doesn't really matter. If the court is aware, as it should be, the court should rule accordingly.

The trial court discharged defendant and entered an order of acquittal.

Double Jeopardy

As a preliminary matter, we must determine whether the prosecutor may properly appeal the trial court's order. A defendant's right not to be twice placed in jeopardy is guaranteed by the federal and state constitutions. US Const, Amend V; Const 1963, art 1, § 15. MCL 770.12; MSA 28.1109 provides that a prosecutor may take an appeal if the Double Jeopardy Clause would not bar further proceedings. The protection offered by the state constitution's double jeopardy provision is coterminous with that of the federal constitution. *People v Thompson*, 424 Mich 118, 125-130; 379 NW2d 49 (1985). It is axiomatic that the prosecutor cannot appeal from the acquittal of a defendant. *Fong Foo v United States*, 369 US 141, 143; 82 S Ct 671; 7 L Ed 2d 629 (1962); *People v Anderson*, 409 Mich 474; 295 NW2d 482 (1980). This principle applies even when the trial court erroneously directs the acquittal. *Fong Foo, supra* at 143. As the United States Supreme Court expressed this principle in *United States v Scott*, 437 US 82, 96; 98 S Ct 2187; 57 L Ed 2d 65 (1978): "A judgment of acquittal, whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, may not be appealed and terminates the prosecution when a second trial would be necessitated by a reversal." However, it is also axiomatic that the mere mouthing of the word "acquittal" or "not guilty" does not control whether an appeal may be taken. As the United States Supreme Court explained in *United States v Martin Linen Supply Co*, 430 US 564, 571; 97 S Ct 1349; 51 L Ed 2d 642 (1977):

> [W]e have emphasized that what constitutes an "acquittal" is not to be controlled by the form of the judge's action. Rather, we must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged. [Citations omitted.]

See also *Scott, supra* at 96-97; *People v Vincent*, 455 Mich 110, 119; 565 NW2d 629 (1997); *People v Mehall*, 454 Mich 1, 5; 557 NW2d 110 (1997).

In *Anderson, supra* at 482, our Supreme Court concluded that the prosecution could not retry the defendant where the trial court had, rightly or wrongly, accepted the defendant's mid-trial guilty plea to a lesser offense of manslaughter, dismissed the murder charge, and discharged the jury; this constituted "a factual determination upon the prosecutor's proofs that one or more elements of murder could not be established." Similarly, in *People v Nix*, 453 Mich 619, 626-627; 556 NW2d 866 (1996), the Court concluded that double jeopardy principles precluded the prosecutor from appealing the trial court's mid-trial grant of a motion for a directed verdict. On the other hand, in *Vincent, supra* at 120, the Court held that the ambiguous statements of the trial judge, when ruling on a motion for a directed verdict, did not amount to a decision on that motion and that double jeopardy did not bar the continuation of the trial. In *Mehall, supra* at 5, the Court explained:

> [E]ven an order that is not termed an acquittal may, in fact, rest upon a finding of insufficient evidence. In such a circumstance, the defendant could not be retried. Conversely, an action that is labeled an acquittal may, in truth, be premised on a

different ground than insufficient evidence. In that situation, it would not violate principles of double jeopardy to retry the defendant.

In short, the label applied by the trial court to its action is not dispositive of whether a defendant's double jeopardy protections are violated by a prosecutor's appeal of a trial court's order purporting to acquit the defendant. For example, in *Scott, supra*, the defendant moved to dismiss two counts of the indictment against him on the basis of preindictment delay and at the conclusion of the prosecutor's proofs, the trial court granted the motion. The United States Supreme Court held that the prosecutor's appeal was not barred by the Double Jeopardy Clause because "the dismissal of an indictment for preindictment delay represents a legal judgment that a defendant, although criminally culpable, may not be punished because of a supposed constitutional violation." *Id.* at 98.

Furthermore, on a number of occasions, this Court has held that where a defendant is not subjected to a second trial as a result of a prosecutor's appeal, the Double Jeopardy Clause is not implicated and there is no bar to the prosecutor's appeal. See, e.g., *People v Carlos Jones*, 203 Mich App 74, 78-79; 512 NW2d 26 (1993) (prosecutor may appeal trial court's post-verdict decision setting aside bench trial verdict finding the defendant guilty of manslaughter and acquitting defendant by determining that he acted in self-defense, where the basis of the court's decision was that court had been "confused" when it rendered the original verdict); *People v McEwan*, 214 Mich App 690; 543 NW2d 367 (1995) (prosecutor could appeal trial court's sua sponte post-verdict determination to grant a new trial), *People v Hutchinson*, 224 Mich App 603; 569 NW2d 858 (1997) (prosecutor can appeal from trial court's sua sponte post-verdict determination reducing offense from possession of 650 or more grams of cocaine to attempted possession of more than 650 grams of cocaine).

Application of the Law

In this case, the trial court clearly determined that there was sufficient evidence to support defendant's conviction of the charged offense. The trial court stated, and re-affirmed in response to the prosecutor's query, that sufficient evidence had been presented to find defendant guilty of the charged offense. The case was dismissed, not because of a lack of evidence, but rather because the trial court sua sponte concluded that the stop of the vehicle in which defendant was riding was illegal. We hold that the trial court's decision in that respect was erroneous. The statute to which the trial court referred, MCL 750.479a; MSA 28.747(1), concerns whether an individual may be charged with fleeing and eluding the police when he or she refuses to stop for a police officer who is not in uniform. The statute does not provide that plainclothes police officers may not make a valid vehicle stop; rather, the statute only provides that an individual cannot be charged with fleeing and eluding under circumstances where that individual could not reasonably have known that he or she was being ordered to stop by police officers. The driver of the vehicle in this case did not refuse to stop for the police, and was not charged with fleeing and eluding. Therefore, the statute had no application to whether the stop of the vehicle in which defendant was riding was illegal. Moreover, because defendant was not the driver or owner of the vehicle, and also denied ownership of the handgun, it is not clear that defendant would have had standing to raise a constitutional challenge to the legality of the stop. *People v Smith*, 420 Mich 1, 28; 360 NW2d 841 (1984); *People v Lombardo*, 216 Mich App 500, 504-505; 549 NW2d 596

(1996). We therefore conclude that the trial court's ruling regarding the legality of the vehicle stop was clearly erroneous. *People v Burrell*, 417 Mich 439, 448-449; 339 NW2d 403 (1983).

We further note that whether the driver of the vehicle was subjected to an illegal stop is not an element of the offense of carrying a pistol in a motor vehicle. MCL 750.227; MSA 28.424. Thus, not only did the trial court find that there was sufficient evidence to support defendant's conviction, but the court's decision to dismiss the charge of carrying a pistol in a motor vehicle was not based on "a resolution . . . of some or all of the factual elements of the offense charged." *Martin Linen, supra* at 571. Because the trial judge pronounced that defendant's factual guilt was satisfied beyond a reasonable doubt, defendant was not deprived of his "valued right to have his trial completed by a particular tribunal." *Wade v Hunter*, 336 US 684, 689; 69 S Ct 834; 93 L Ed 974 (1949). Furthermore, no additional proceedings directed at the ascertainment of defendant's guilt or innocence are necessary and thus defendant will not be subjected to a "second trial" by this decision.

Finally, we agree with the prosecutor that our prior decision in *People v Wilcox*, 183 Mich App 616; 456 NW2d 421 (1990), does not compel a different result because that decision is distinguishable. In *Wilcox* the trial court interrupted the trial and dismissed the charge because it desired that this Court should render an advisory opinion regarding a warrantless arrest question. The trial court's action in that case had the effect of a mistrial declared without the defendant's consent and therefore a retrial was barred by double jeopardy. *United States v Jorn*, 400 US 470; 91 S Ct 547; 27 L Ed 2d 543 (1971). However, as noted, in the case presently before this Court, the trial was completed and the trial judge pronounced that the evidence was sufficient to find defendant guilty of the charged offense beyond a reasonable doubt. Accordingly, the *Wilcox* decision has no application to the current case.

We therefore conclude that the protections afforded by the Double Jeopardy Clauses of the federal and state constitution are not violated by the prosecutor's appeal of the trial court's erroneous ruling regarding the stop of the vehicle in which defendant was riding. The ruling itself is clearly erroneous because it is not an accurate statement of the law. The trial court's order purporting to "acquit" defendant is therefore vacated and this case is remanded for entry of a judgment of conviction of the charged offense of carrying a dangerous weapon in a motor vehicle, MCL 750.227; MSA 28.424, and for sentencing on that conviction.

Reversed and remanded. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald